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No. 89-1421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARVIN POWELL, *et al.*,
Petitioners,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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The prudential considerations acknowledged by the Solicitor General (Br., pp. 17-19) themselves call for denial of the petition for certiorari and, in addition, there are evident errors in the Solicitor General's analysis of the issues raised by the decision of the court below.

1. In tendering this case, petitioners argued that the labor exemption terminates when a collective bargaining agreement expires. The courts below squarely rejected this contention, as does the Solicitor General. (Br., pp. 11-12). The district court held that the exemption terminates at impasse, a position rejected by both the Court of Appeals and the Solicitor General. (Br., p. 17). In-

stead, the Solicitor General urges this Court to reach a result not suggested by any party and not considered, let alone adopted, by any judge below—that immunity should terminate because the employer, after good faith bargaining, initiates a post-impasse change entirely in accordance with the governing labor laws.

The Solicitor General acknowledges (Br. pp. 17-18), that the Eighth Circuit's opinion does not conflict with any decision of either this Court or other appellate courts, and it is obvious that further experience with the issues in the lower courts would be helpful. (*See* Br. p. 18). It is significant in this respect that, despite the Solicitor General's speculation as to the impact of the decision below on labor-management relations, this case is one of first impression—the issues raised by petitioners here have not previously surfaced, even though successful bargaining in a multi-employer context has been long established in professional sports and elsewhere. The reason, we suggest, is pervasive recognition that, contrary to the Solicitor General's assertion, application of the antitrust laws would be destabilizing rather than helpful in furthering the collective bargaining process.[1]

2. The Solicitor General's brief (p. 16) rests on the premise that an impasse signals the end of the collective

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[1] The Solicitor General is also incorrect in indicating (Br., p. 19) that settlement of this labor dispute through collective bargaining is not a realistic option. The National Football League Players Association ("NFLPA"), which is funding this litigation, has indicated that a settlement of this litigation "could mirror a collective bargaining agreement." *USA Today*, Oct. 4, 1990, at 7C. Moreover, issues as to the continued status of the NFLPA as the collective bargaining representative of NFL players remain to be litigated in this case, as well as in McNeil v. National Football League, Civ. No. 4-90-476 (D. Minn.), and Five Smiths, Inc. v. National Football League Players Ass'n, Civ. No. 3-90-177 (D. Minn.). Contrary to the Solicitor General's suggestion (Br., p. 1, n.1), the NFLPA was not dismissed from this case because of its purported abandonment of collective bargaining rights, but because it lacked standing to pursue an antitrust claim.

bargaining process. In one of the very cases cited in this discussion, however, *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404 (1982), this Court affirmed the contrary conclusions of the NLRB. The Court there held that an impasse in collective bargaining negotiations is not an appropriate occasion for permitting individual employers to withdraw from a multi-employer bargaining unit. The Court explained:

> "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.' Furthermore, an impasse may be 'brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process.' Hence, 'there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways.'" 454 U.S. at 412 (quoting Board's opinion below).

The Solicitor General's suggestion that impasse is "[a]n analytically logical point" (Br., p. 16) for termination of the labor exemption fails to take into account, as both this Court and the NLRB have recognized, that the collective bargaining process continues after impasse, which is merely a "temporary deadlock or hiatus in negotiations."[2] Moreover, the impasse test does not, as the So-

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[2] In *Bonanno*, the Court noted that permitting employers to withdraw at impasse could operate to precipitate impasses that otherwise would not occur. *See* 454 U.S. at 412-13 n.8. The same defect inheres in the Solicitor General's conclusion that the labor exemption should terminate following impasse, in that unions would be induced to declare that negotiations are at an impasse, rather than to continue to negotiate, in order for the antitrust threat to be available to them. That is precisely what happened in this case. One day after the district court opined that the labor exemption would not terminate until impasse, the NFLPA announced the existence of an impasse and refused to participate in additional negotiations. See Pet. App. 4a.

licitor General ultimately acknowledges (Br., p. 17), provide a workable standard that could be used by employers to guide their conduct and to avoid treble damage liability. The Solicitor General's attempt to take these concerns into account would involve the parties in considerable guesswork and the courts in lengthy and burdensome litigation.

3. Similarly, the Solicitor General fails to appreciate that employers are not free at impasse to alter terms and conditions of employment in any manner they see fit; any change must be consistent with offers made in good faith to the union during the collective bargaining process. *See, e.g., Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 543-44 n.5 (1988). The Solicitor General is also mistaken in believing that applying the antitrust laws following impasse in this case is necessary because, otherwise, the NFL would be "benefit[ting] [from] the antitrust exemption without having to pay for it." (Br. p. 15). The fact is that NFL players are continuing to receive numerous benefits of the expired collective bargaining agreement; it would be unfair for the NFL clubs not to receive their own corresponding benefits under that agreement. The requirement that, at impasse, employers must act in good faith and in accordance with their prior offers is a significant restriction on their ability to "unilaterally diminish or rescind" those elements of an expired collective bargaining agreement that benefit employees. (Br., p. 15).

4. The Solicitor General twice refers to "employer-imposed restraints." (Br., pp. 13, 14). That is not the case here. The restraint at issue, the NFL's Right of First Refusal/Compensation system, was agreed to by the NFLPA, and has remained unchanged since its incorporation into the now-expired collective bargaining agreement. As noted in the Solicitor General's brief (p. 8), the system now applies only to a reduced number of players. The system itself, however, is unchanged, and

cannot fairly be characterized as an "employer-imposed restraint."

5. The "proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets," *Connell Construction Co.* v. *Plumbers & Steamfitters, Local Union No. 100*, 421 U.S. 616, 621-22 (1975), is, indeed, "a difficult question." (Br., p. 9). This question is not, however, presented in this case, for it is undisputed that the restraint at issue here does not affect in any way "competition in business markets"; the restraint's only effect is in a labor market. It is for this reason, not the reason suggested by the Solicitor General (*id.*), that this case does not implicate *Connell* and this Court's other labor exemption cases. *See Wood* v. *National Basketball Association*, 809 F.2d 954, 962-63 (2d Cir. 1987); *cf.* Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1, 21-28 (1971). This is a labor dispute plain and simple that should be resolved by collective bargaining.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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